IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF OKLAHOMA

BLACK EMERGENCY RESPONSE TEAM, ET AL.,	)	
Plaintiffs,	)	CASE NO. CIV-21-1022-G
vs.	)	
JOHN O'CONNOR, IN HIS OFFICIAL CAPACITY AS OKLAHOMA ATTORNEY GENERAL, ET AL.,	)	
Defendants.	)	

TRANSCRIPT OF MOTION HEARING

BEFORE THE HONORABLE CHARLES B. GOODWIN

UNITED STATES DISTRICT JUDGE

DECEMBER 4, 2023

Proceedings recorded by mechanical stenography; transcript produced by computer-aided transcription.

Emily Cripe, CSR

United States Court Reporter
U.S. Courthouse, 200 N.W. 4th St.
Oklahoma City, OK 73102 * 405.609.5094

APPEARANCES

FOR THE PLAINTIFF(S):

Emerson Sykes
Sarah A. Hinger
American Civil Liberties Union Foundation
125 Broad Street
New York, NY 10004

Megan E. Lambert
ACLU of Oklahoma Foundation
P.O. Box 13327
Oklahoma City, Oklahoma

David Hinojosa
Maya Brodziak
Lawyers' Committee for Civil Rights Under Law
1500 K Street NW, Suite 900
Washington, D.C. 20005

FOR THE DEFENDANT(S):

Garry M. Gaskins, II
William P. Flanagan
Oklahoma Office of the Attorney General
313 NE 21st Street
Oklahoma City, Oklahoma 73105

W. Daniel Weitman
Tina S. Ikpa
University of Oklahoma Office of Legal Counsel
600 Parrington Oval, Suite 213
Norman, Oklahoma 73019

F. Andrew Fugitt
The Center for Education Law
900 N. Broadway Avenue, Suite 300
Oklahoma City, Oklahoma 73102

(Proceedings held December 4, 2023.)

THE COURT: Good morning, everyone.

The Court calls the case of the Black Emergency Response Team, et al., vs. Gentner Drummond in his official capacity as Oklahoma attorney general, et al., it's Case No. CIV-21-1022.

The matter comes here before the Court for a hearing on plaintiffs' motion for a preliminary injunction, asking that the Court enjoin various government officials and Oklahoma's largest school district from enforcing what was designated as House Bill 1775 and its implementing regulations, which I will refer to generally as just "the Act" in the course of this hearing.

I'll have counsel make their appearances.

MR. SYKES: Emerson Sykes for the plaintiffs.

MS. BRODZIAK: Maya Brodziak for the plaintiffs.

MS. LAMBERT: Meagan Lambert for the plaintiffs.

MR. HINOJOSA: David Hinojosa for the plaintiffs.

MS. HINGER: Sarah Hinger for plaintiffs.

THE COURT: Thank you.

MR. GASKINS: I'm Garry Gaskins, and I have Will Flanagan from my office. We represent the state defendants, which I think are defendants 1 through 18.

MR. FUGITT: Andy Fugitt for Edmond Public Schools and the Edmond defendants.

MS. IKPA: Tina Ikpa for the University of

Oklahoma.

MR. WEITMAN: Dan Weitman for the University of Oklahoma and the board of the University of Oklahoma.

THE COURT: Thank you.

All right. I want to start the hearing by, in general, allowing you to make the arguments that you want to make, and to the extent I can, without interruption by me.

I have read all the materials that you have submitted. I certainly have lots of questions. I have given you some of those questions in advance, the ones that I thought would benefit from at least a little bit of advance notice. But I want to hear in general what you think are the central reasons for why the Act should be enjoined or why it should not be enjoined.

My general intent then would be to give each side 15, 20 minutes of time to present your arguments and then we'll turn to my questions. I'll say that in doing that I have lumped the defendants together in general. I don't know how you have -- how you have -- or what you would request as far as how you would present your argument.

Tell me, are you going to have a central speaker for all of the defendants or is everybody presenting their own argument?

MR. GASKINS: I think I will primarily be making the arguments for the defendants, although there may be a

couple of issues that are unique to the university or to the Edmond Public Schools that they may weigh in on after me, but I will primarily be addressing all issues.

THE COURT: Okay. Then we'll just handle that as it comes along. I'm going to take it from that that it's not going to be a central issue and we are not going to need to have each group argue on each point.

So let me start with the plaintiffs then, and I'll give you 15 minutes or so. Tell me what you think I need to know.

MR. SYKES: Thank you very much, Your Honor. And I'm not sure we'll need the whole 15 minutes, but I'll start with my opening and we'll get into it.

Thank you so much, Your Honor. We're here before you today because plaintiffs are seeking to enjoin the further enforcement of Oklahoma's HB 1775. This is a law in which the legislature used language that's vague, overbroad, and viewpoint discriminatory to restrict teaching about racism and sexism in Oklahoma's public colleges, universities, and public schools.

As you know, plaintiffs bring four claims. We've moved for a preliminary injunction on the first three, and I'll just walk through them very briefly.

First, the law is unconstitutionally vague because teachers, many of whom are here with us in the courtroom, can't understand what content can be taught and what can't, and they

risk losing their livelihoods if they get it wrong.

A statute can be vague for two independent reasons; one, as I mentioned, is because of notice. Those who are subject to the law don't know what conduct is proscribed and what is permitted. Laws can also be vague because they open the door to arbitrary and discriminatory enforcement, and here we have seen exactly that with HB 1775. The state has continued to enforce the Act in the intervening time since we brought this case, and we've seen from their enforcement actions that it does, in fact, open the door to arbitrary and discriminatory enforcement.

As Edmond Public Schools itself has admitted, unfortunately, quote, no one truly knows what the law means. And even lieutenant governor of the state of Oklahoma recently stated publicly that the law is need of clarification.

Your Honor, three federal courts have already looked at similar laws, and all three held that the law and the language within it is unconstitutionally vague at the PI and motion to dismiss stage.

Our second claim is that the law violates public school students' First Amendment right to receive information. They have a right to receive an education free from partisan and political censorship. Teachers are being forced by the legislature to withhold information from students with no reasonable relationship to any legitimate pedagogical purpose.

As you saw in Exhibit 1 to our complaint, Edmond Public Schools has explicitly told teachers that when confronted by questions like "what is CRT," they can offer only the most anodyne and sanitized language that doesn't truly respond to students' questions and shuts the door to further inquiry instead of creating what the standards at the Oklahoma Academic Standards encourage, which is an open learning environment where students are encouraged to ask questions, encouraged to evaluate various viewpoints, and to build their critical thinking skills.

Our third claim is that the law violates the First Amendment because it is overbroad and a viewpoint-based restriction on academic freedom in higher education. Instructors are modifying their syllabi, and the university is changing the curriculum to comply with HB 1775.

This kind of intrusion into academic inquiry by the political branches is an affront to academic freedom unlike any we've seen since *Keyishian* and *Sweezy*. And I'll just note here, Your Honor, that as we look at the case law on academic freedom, the vast majority of those cases involve disputes between teachers or students and the universities themselves.

What we have is something much more dangerous for our democracy. We have the political branches, the legislature, reaching straight into the university classroom and telling teachers what they can and cannot teach, the specific views that they can and cannot express. And this type of viewpoint

discrimination in a college classroom by the political branches is beyond the pale.

For our first claim we have alleged in our complaint and will further prove through discovery that the law violates the Equal Protection Clause of the 14th Amendment. All of the Arlington Heights factors indicate discrimination, including historical and political context, the dramatic departures from both procedural and substantive norms, legislature's inflammatory racialized statements while the law was being considered, and the disparate impact the law is having on black and indigenous students whose stories are being erased from the curriculum.

Your Honor, I'm happy to dive into the questions that you sent, but we can also go back and think more about exactly how vague this law is. We have pointed to a number of different provisions within the law that raise our concerns, and we think that the law is riddled with these concerns such that it should be enjoined in its entirety.

Section 1(A), as you noted, applies to higher education. It prohibits mandatory gender and sexual diversity trainings, whatever those are, as well as any orientation or requirement that merely presents any form of race or sex stereotyping or bias on the basis of race or sex.

This small sentence has multiple problems in it. Defendants want to interpret orientation or requirement to mean

required orientation, but this is the kind of rewriting of the statute that is simply not allowed in this kind of proceeding. Your Honor, if requirement means anything in the college context, it must mean required courses, and probably also required readings.

And it's not just us who have read the law this way. The University of Oklahoma changed a required course from mandatory to voluntary because of HB 1775. And I want to make clear our First Amendment claim is not rooted in the change of this course in particular. I cite this example to underline the fact that the University of Oklahoma believed that the Gateway to Belonging course -- which is not a training, it is a course -- was subject to HB 1775.

Our best reading is that requirement covers the classroom. OU's reading, apparently, is that it covers the classroom, despite what they have said in their briefing. And if the law intervenes into the college classroom, it is a direct affront to academic freedom and Your Honor can look no further than related litigation in the Northern District of Florida which struck down a very similar law.

Merely presenting any form of race or sex stereotyping or bias we think gets into the viewpoint-based discrimination. The overbreadth is reaching into the college classroom, and the viewpoint-based discrimination is because you're not even allowed to discuss these ideas. Merely presenting these ideas,

even to criticize them, seems to be proscribed by the law.

Moving to Section B, which covers the K through 12 context.

This set of eight divisive concepts was directly cut and pasted from former President Trump's executive order 13950, which before we even filed was enjoined on the grounds of vagueness. Not deterred, the Oklahoma legislature, and I have to admit a few other legislatures, adopted very similar or identical language.

As I mentioned, in the Santa Cruz Diversity Center, the Northern District of California enjoined Executive Order 13950 because it said that this list of eight divisive concepts was hopelessly vague and provided -- did not provide notice for contractors, grantees, and other government workers to understand what would be prescribed and what would not by the plain language of these eight concepts.

Your Honor, when we get into the eight concepts, there are two other directly relevant pieces of precedent. One is the -- a case out of the District of New Hampshire called *Mejia*. And in that case a judge looked at an almost identical set of the first four concepts. New Hampshire, instead of eight concepts, used four, but they are substantively identical to the ones we have here.

And what the judge said there was, again, the language was hopelessly vague. He applied a heightened standard because the

law implicates First Amendment values and held that the law was unconstitutionally vague.

A third case out of the Northern District of Florida looked at the application of these eight principles almost identical to the college setting specifically. There were some companion cases. One, *Honeyfund* ruled that the Stop Woke Act, Florida's version HB 1775, was unconstitutionally vague as it applies to private employers. But more directly relevant to the case at hand, in *Pernell vs. Lamb*, the Court looked at the provision of the Stop Woke Act, again that's Florida's version of HB 1775, as it applied to higher education and specifically held that the law was vague with regard to higher education by any standard, whatever -- there was some back and forth about what standard was appropriate in the higher education context and the judge looked at various standards and said, look, this law, especially provision four, which prohibits anyone from teaching that anyone cannot or should not attempt to treat others without respect to race or sex. This, the Court said, achieved the rare triple negative and was completely incomprehensible to those who are subject to it.

Likewise, if you want to look at the -- the specific language, there's a provision -- I think that the -- the HB 1775 is actually more vague than -- than Executive Order 13950, the Stop Woke Act, or SB1 in New Hampshire for two particular reasons, and we highlight them in our briefing.

One is the formulation "make part of a course." So this comes in Section B with regard to the eight -- the eight banned concepts. And as we have argued and as plaintiffs have shown, what does it mean to make something part of a course? It is completely unclear. Again, it seems to indicate that even raising issues around racism and sexism to criticize those ideas -- for example, the first concept is that one race or sex is inherently superior to another. None of our plaintiffs are actually teaching that, but they are teaching about that. They are teaching about racism. They are teaching about sexism. How can you teach American history, Oklahoma history, current affairs, almost anything without at least having the opportunity to discuss the types of hard truths that we have dealt with as a society. So we have -- "make part of a course" is something that was not in any of the other statutes and we think that it makes it, in fact, much worse.

Another provision that doesn't appear in the other two statutes but has been cut and pasted elsewhere is subsection G, which says that it's prohibited to teach -- or to make part of a course, I should say, that anyone should feel any anxiety or any -- discomfort, anguish, or any other form of psychological distress on account of race or sex.

On first read, it might make sense. None of the teachers that we represent are purposefully trying to make their students feel bad in their classrooms. But by the plain letter

of the law, it seems to indicate that teachers should somehow teach that African-American students should not feel discomfort when learning about slavery, that Jewish students should not feel discomfort when learning about the Holocaust, that American Indian students should not feel discomfort when learning about the Trail of Tears.

When you think about how this law is supposed to be implemented and interpreted by the teachers who are at the front lines, it's clear, if you put yourself in their shoes, you have an impossible choice. They avoid these topics altogether or they risk losing their jobs.

Your Honor, the vagueness is further emphasized -- this "make part of a course" vagueness is further emphasized by the enforcement actions that have been taken by the state. The state -- complaints have been made under HB 1775 since we filed. Multiple investigations have been undertaken, which we've provided notice of to the Court and there's briefing on. And what I want the Court to specifically note is in these enforcement actions, none of these were around curricular speech. Well, the Tulsa -- the Tulsa enforcement action and the Boismier enforcement action were not about curricular speech. One was about professional development for teachers which was found to have violated HB 1775, and the other one was a QR code that was supplied by a teacher to their students.

So these enforcement actions show that even if we were to

read the language "make part of a course" as defendants do, that is not, in fact, what the state is doing and that is not how the state is interpreting and enforcing the law.

Your Honor, I'll just say another word about our right to receive information claim. As much as we talk about the teachers and the instructors and the impossible position that they are in, at the end of the day the folks who suffer the most under HB 1775 are probably the students. There is a recognized right of students not only to speak -- of people in general not only to speak, but to receive information. And we cite to multiple cases that, in fact, recognize students' right to receive information in public schools.

Far from what defendants characterize as a right to dictate what's in the curriculum, it's a very specific right based in the *Hazelwood Pico* line of cases, which says that if a government is going to restrict access to information, if they're going to withhold information from students, it must be reasonably related to a legitimate pedagogical concern.

And we think this is the appropriate test in the K-12 context. It recognizes and defers in large part to the state to create its own curriculum. Of course, the state creates public school curriculum, but it says it has to at least have some reasonable relationship to some legitimate pedagogical concern. And here, HB 1775 falls short of even that low bar.

There was no legitimate pedagogical concern raised by the

legislature. They were talking about their distaste for Black Lives Matter, they were talking about the broader political context and the racial reckoning that we saw in the summer of 2020.

These are not educators making reasoned decisions about what should and should not be in the curriculum. In fact, those decisions were made by Oklahoma educators through the Oklahoma Academic Standards, which tell a very different story and paint a very different picture than HB 1775.

The stated interests of the defendants, antidiscrimination, is, in principle, potentially a legitimate interest, but we have reason to believe that that is not their actual interest here. But even if we take their word for it that they do have a legitimate interest in preventing discrimination in schools, the provisions of HB 1775 do nothing to achieve that goal.

There is existing anti-discrimination law. You are already prohibited from discriminating against students or teachers based on their race or any other protected category. That is well enshrined in anti-discrimination law.

What this law does is something quite different and unique. It picks specific ideas that are politically incorrect, according to the Oklahoma legislature, and prohibits the mere discussion of these ideas in public schools, and by extension, discussion about race and sex in college classrooms.

And we ask Your Honor to recognize the problems on the face of this law, the problems so far with the implementation of this law, and to not allow this law to continue to wreak havoc on Oklahomans for another day.

I think when we look at what has happened since we filed, on the one hand we have the official enforcement actions which make clear that Oklahoma has every intention of enforcing this law, not just narrowly, but to the broadest extent possible, extending even beyond the broad language that is in the text of the law.

But that doesn't even capture all of it because what really is happening in Oklahoma schools -- and this has been covered in our declarations, it has been covered in the media coverage -- but the chilling effect that has settled over education in Oklahoma is dramatic and it can directly be traced to HB 1775. Teachers, and even districts, as EPS admitted, can't know what is allowed and what is not allowed, and so they live in fear.

And so we ask you, Your Honor, today to try to help us alleviate that fear and make clear to these teachers and to these students that their best interests are at heart and that we will not let the state continue to negatively impact their educations to score partisan and political points.

Thank you, Your Honor.

THE COURT: Thank you.

I'll hear argument from the defendants.

MR. GASKINS: Thank you, Your Honor, and may it please the Court.

Your Honor, Oklahoma has a legitimate pedagogical justification for House Bill 1775, that is protecting children from race and sex discrimination in school curriculum. Further, despite the arguments by plaintiffs, House Bill 1775 does not interfere with classroom study or academic research in a university setting. And there is no authority that I'm aware of supporting the novel proposition that a K-12 student has a constitutional right to dictate the curriculum they receive on any given topic in the classroom.

Further, unlike university professors, secondary school teachers do not have a constitutional right to academic freedom on the curriculum they teach. Therefore, the state defendants do not believe that there is any basis for this Court to invalidate House Bill 1775.

I'm going to dig into the various questions the Court asked on Friday. Before I do that, I want to discuss a couple of cases that the plaintiff mentioned in their opening argument.

The first case is this Florida case, Honeyfund. I think that case is easily distinguishable. First, I will say the -- compare Florida's law and Oklahoma's law, some of the terms that the Court was confused -- confused with were slightly

different. For example, the Florida law says "morally superior." But I think the big distinction, though, is the Florida law doesn't have the Safe Harbor Provision that Oklahoma's law has. Oklahoma's law says that the Oklahoma Academic Standards control to the extent that there is a conflict with the remaining terms. There's no such language in the Florida law.

So I think that -- that that's a big distinction, and I think that is one of the specific questions the Court had, which I'll address here in a second.

I would also point out that that case was appealed, the Honeyfund case. It was orally argued in front of the Eleventh Circuit in August. So a decision on that Honeyfund case, appellate decision could be issued any day. But regardless, I believe it's distinguishable because there is no safe harbor.

And this New Hampshire case that plaintiffs mentioned in their opening argument, I believe that's also distinguishable because Oklahoma -- and as the Court pointed out in one of its questions -- to punish a teacher under House Bill 1775 there is the scienter requirement, and I don't believe that there was this willful violation in the New Hampshire case.

Finally, that Northern District of California case that plaintiffs mentioned, that was an order that was entered right before there was a change in the administration. It obviously was not appealed by the -- by the Biden administration. I --

there is no appellate authority examining that decision and determining whether it was correct, and it was also limited to -- to certain groups, federal contractors. There wasn't any plaintiffs that had standing to challenge some of the other provisions, so I'm not sure that that really provides much help in this case.

So as to the specific questions the Court asked, I think the first one is -- is an important one, it's the applicable standard for evaluating plaintiffs' facial vagueness, viewpoint discrimination, and information right claims.

THE COURT: And let me say, if we're going to get into the questions, then I want to do those in a manner where I'm going to ask each side to talk about each question specifically.

As far as your introductory statements, I mean, if there's anything, whether it relates to my questions or not, that you think is broadly applicable or what you think are really the central points, I want you to highlight those for me now.

MR. GASKINS: Well, I will say that we do think, two points is, one, is that there is the Safe Harbor Provision in the law, which I believe is an important distinction from the cases that have been cited by the plaintiff.

The -- the fact that the Oklahoma Academic Standards, specifically the Social Study Academic Standards, clearly permit teachers to talk about various issues regarding race

relations. They permit teachers to talk to students about the Tulsa Race Massacre, Jim Crow laws, the rise of the Ku Klux Klan. There's many more issues like that. So I think it's clear that teachers have the ability and have the -- have the means to -- to still discuss important issues of -- of race and discrimination with their students.

And additionally, as the Court -- one of the other questions that I think is important, especially with respect to that New Hampshire case, is the scienter requirement that there has to be a willful violation. A teacher cannot be punished for instructing students on concepts unless they know those concepts are prohibited.

So if -- if a prohibition itself is vague, by definition the teacher cannot willfully violate it. So I think a lot of the -- the alleged harms that the plaintiff have asserted here are -- are overblown with respect to that scienter requirement.

I would also point out, I know that this has been fully briefed, but the -- some of the issues that -- about the Tulsa schools and the Mustang schools, I don't believe that there's anyone that's a plaintiff here today that was affected by those decisions, would have standing to assert those, but I believe those have been fully briefed, regardless.

But again, the state defendants, we filed, I think six separate briefs on this issue. I think there's been 16 briefs filed. I know the Court is well aware of the issues.

So outside of answering the Court's questions that it has and any other questions, I think we'll stand by our briefs.

THE COURT: Thank you.

Any additional argument as far as the introductory section?

MR. WEITMAN: Your Honor, I'll be very brief for the University of Oklahoma. OU stands in a very unique constitutional position in that we are created by the Constitution, we are a state constitutional entity, we have a great deal of independence from the legislature. The legislature cannot reach in and dictate what is taught in our classrooms at the university, what our curriculum is going to be. The Supreme Court has said so in the Baker case. Recently, in the Franco case that -- that position was reaffirmed.

So to that extent, we don't think that OU is a proper party. We don't think that there's standing against OU, and that's kind of central to our position in this case. Thank you.

THE COURT: Okay.

MR. FUGITT: Very briefly, Your Honor, on behalf of Edmond Public Schools. I'm not here to defend 1775. That's not my job. My able counsel has done that. I am here to defend, to the extent necessary, Edmond Public Schools' efforts to comply with the law.

One thing I would address is to the extent that plaintiffs' counsel's somehow indicating that Edmond Public Schools has admitted or acknowledged that 1775 is so broad as to be unconstitutional, that's not factually correct based on the record.

The record before you contains some information that -- some of it was attached, some exhibits that were attached to the complaint purporting to be guidelines the plaintiffs say were adopted by Edmond Public Schools. Those guidelines weren't adopted by anybody. Exhibit No. 2 to the complaint, which is a screenshot from a PowerPoint that was done as part of a teacher's meeting, are personal notes created by the director of curriculum at a meeting that she shared with other teachers. Those weren't adopted by anybody or -- not by the board, not by the administration. That was just information that was compiled. Edmond Public Schools hasn't adopted anything.

The other point that I would like to make is that in our response, document 60-1, Edmond Public Schools did indicate that what they told their teachers, that the law does not prohibit -- 1775 does not prohibit conversations about race, ethnicity, diversity, or gender. They told -- Edmond told its teachers, you still have all the tools you had before and, as always, do not interject your opinions.

My client, Edmond Public Schools, doesn't get to decide

what the curriculum is. The legislature empowers the State Board of Education to adopt curriculum standards, as they have done.

A teacher, as in the individual plaintiffs here, doesn't have a constitutional right to dictate curriculum. The rights of students to listen is derivative of the rights of the teacher to teach. If the teacher doesn't have the right to dictate the curriculum, then how have -- have the rights of the students been harmed? We'd -- for Edmond Public Schools, we stand by the position of the state of Oklahoma.

Thank you.

THE COURT: Thank you.

Okay. Let's work through the written questions, and I'm going to ask some additional ones as we go along.

But the first one is about just the standards that apply. And you both addressed those to some extent, but I want you to break it down for me because this is a central issue methodologically, and to some extent it's not -- there are issues in flux there.

So let me start with plaintiffs. And tell me, what do you think is the applicable standard for the facial vagueness, information rights viewpoint discrimination claims, and are those different? How so?

MR. SYKES: Sure, Your Honor.

We briefed the sort of basic vagueness test, which comes

from *Grayned*, a Supreme Court case, and *Hill v. Colorado*, another Supreme Court case which established, as I mentioned, a two-part inquiry saying that vagueness can be established in two independent ways. One is if those who are subject to the law cannot be reasonably expected to understand what conduct is prohibited and what is permitted, and the second inquiry is around whether it opens the door to arbitrary and discriminatory enforcement. What I didn't mention is that we also cited a Tenth Circuit case which encapsulates not only those definitions, but also the additional note that the vagueness standard is especially rigorous in the First Amendment context. And again, this is sort of settled -- settled law.

And the New Hampshire case, *Mejia*, in that case, which, again, is in the K-12 context on a -- I think probably on the facts that are most directly similar to this case, the judge in that case spent ten pages in their motion to dismiss ruling going over what is the proper applicable standard to K-12 teachers. And I -- where they landed, essentially -- there was a much more -- much more briefing on the vagueness standard in particular in that case. And where the judge landed essentially was on a heightened standard because it is a vague law that implicates First Amendment interests. And so in *Mejia* he adopted this *Hill v. Colorado*, Dr. John's sort of additional rigor that is required in the First Amendment context.

In the *Pernell* case, the judge looked at a few different formulations of vagueness and whether there needed to be a different formulation in the context of a public employee. And what the judge found there was by any standard this is vague. Right? It doesn't matter exactly what test you're applying, it's vague.

And just to highlight that, you know, whether Edmond Public Schools' guidance was adopted or official or not, I think it does stand on its own for the proposition that people of reasonable intelligence have a hard time figuring out what this law means. The people of reasonable intelligence who have a hard time figuring out what this law means is a long list.

Defendants claim that we are pretending not to understand. Perhaps -- that would mean that Edmond Public Schools itself is also pretending not to understand, or whoever it was that drafted that guidance. The lieutenant governor also doesn't understand what this law means. And so it -- I think it's not just plaintiffs or counsel pretending not to understand. There's legitimate confusion that is borne by the law.

That's what I have on the vagueness standard. I can move on to the viewpoint discrimination and information rights, but I don't know if you want to take a break there.

THE COURT: Well, let me ask, so suppose that the appropriate standard for a facial vagueness challenge is that there is no clear non-vague application of the law. If I

accept that that's the standard, does your claim survive, or at least your request for an injunction?

MR. SYKES: Your Honor, we think that's the inappropriate standard, but I think even by that standard the language "make part of a course," the triple negative, the discomfort and anguish, there are no plausible narrow, clear readings of that language. It opens the door up, and no one knows exactly what these things mean based on their own terms or in context.

And the *Mejia* court looked in detail. I don't understand defendants to have put forward such a strict definition of vagueness that was actually submitted by counsel in *Mejia*, but what the Court did was worked through whether or not that's, in fact, still good law. And *U.S. v. Johnson* says that the law does not need to be vague in all its applications. And so there is at least an open question about whether that test established by the Supreme Court, sort of vague in all its applications, is still good law. But even what the *Mejia* court found was that -- probably not good law, but even if it were, it never applied to situations that were related to First Amendment interests. And so we think that it is probably not good law in general, but especially inapplicable in this -- in this case.

That said, by any standard, Your Honor, if a reasonable person, any person from any side of this argument can come

forward and explain clearly what these laws mean, I welcome them to do so. I think what we have heard from counsel are some narrow interpretations. They have talked about the scienter requirement, the standards, the fact that the Oklahoma Supreme Court can't -- has said that the legislature can't reach into the classroom.

These are all well and good to hear from counsel and in their briefing, but, with respect, their actions say something different and show a different interpretation.

The scienter requirement was not a safe harbor for someone sharing a QR code or doing a professional development training that said that now the law is implicated as making part of a course one of these prohibited concepts. The fact that there was a scienter requirement provided no -- no safety for them.

Likewise, the standards themselves are completely incompatible with the ideas contained in HB 1775. And especially, you know, picking up on one of the examples, one of the -- my friend on the other side talked about all of the explicit examples that are mentioned in the Oklahoma Academic Standards, and that's true. But as we have raised in our declarations, instructors are at a loss for how to square these two completely inconsistent documents. And what about examples that are not in the Oklahoma Academic Standards?

The standards do not provide specificity about lesson plans and which books to teach and those sorts of things. The

standards are broader than that, and they talk about encouraging critical thinking, evaluating a broad variety of perspectives, and looking at how people's personal experiences might inform what they say or do. How can you talk about that without talking about stereotyping, bias, these types of concerns?

So while we, you know, value the Oklahoma Academic Standards and things that they encapsulate, you know, an expert input in terms of what should and can be taught in Oklahoma public schools, HB 1775 completely undercuts all those. And teachers, like those who are in the room, are left to wonder, well, it said I can teach about this historic incident, but what about this new issue that came up, someone on death row? How am I going to talk about these important issues of current affairs without addressing these issues if these current affairs are not explicitly in the Oklahoma Academic Standards?

THE COURT: Can I consider any of that evidence about how people respond, whether it's the state or whether it's teachers in deciding a facial challenge? I mean, isn't it just about the statute itself?

MR. SYKES: Your Honor, we are totally comfortable with you staying within the four corners of the statute. We think on its face it is obviously vague. We have provided evidence that we think further shows its vagueness, that it is not just us who are confused, but we do not think that you have

to look at any of this other information. The law on its face speaks for itself, however unclearly.

THE COURT: Well, keep going on the -- the other standards.

MR. SYKES: Sure, Your Honor.

So the next question was about the viewpoint discrimination standard. And just to clarify, the viewpoint discrimination claim that we bring is, in some sense, paired with our overbreadth claim, and that is related to higher education. Right?

So we're focusing in primarily on this "or requirement" language. Again, I agree with counsel for OU that the Oklahoma Supreme Court has said that the legislature can't dictate what's happening in classrooms, but apparently that's exactly what they have done. And OU itself has interpreted that way by changing classes because of the law.

So when we're looking in higher education at what impacts the classroom, we have argued here and elsewhere that this type of viewpoint discrimination from the legislature is entirely inappropriate and an affront to the First Amendment of the highest order, and there are many cases that say that viewpoint discrimination is per se unconstitutional.

Now, the Tenth Circuit in *Axson-Flynn* has said that *Hazelwood* -- the *Hazelwood Pico* line of cases is also instructive in higher education -- or is instructive in higher

education in terms of what can be in the curriculum. And *Pernell*, the case in the Northern District of Florida, which is exclusively about higher education, applied a case called *Bishop*, which is an Eleventh Circuit case, which took *Hazelwood* as its polestar, it said, but didn't directly apply *Hazelwood*, and did a balancing test where it looked at the context, the unique context of the university, the government's interest both as an employer and as a maker of curriculum, and the special inquiry around academic freedom. So it's a three-part balancing test from *Bishop*, which is informed by *Hazelwood*.

And I think even if Your Honor were inclined to take the approach of *Axson-Flynn* or even of *Pernell* and applied *Hazelwood* to the higher education context -- in *Axson-Flynn* the Tenth Circuit noted how problematic it might be to apply K-12 standards to higher education. In higher education, all the people involved are adults, they're there voluntarily. It's a very different kind of mission in higher education than in K-12.

But even if Your Honor -- you know, we're not asking you to overturn Tenth Circuit precedent -- if Your Honor wants to adopt a *Hazelwood* framework in order to look at how the law can impact the classroom, again assuming that the law does impact the college classroom, it would still have to go through the analysis of whether these decisions are reasonably related to a legitimate pedagogical purpose. And the idea of prohibiting

college professors from even presenting stereotypes or bias must fail *Hazelwood*.

I can move on to --

THE COURT: You can move on.

MR. SYKES: -- informational rights.

So, Your Honor, the -- my friend on the other side said there's no cases that say that a student can dictate what's the curriculum. We haven't made such a claim, but there are multiple courts that have recognized the student's right to receive information as a First Amendment interest.

Arce v. Douglas in the Ninth Circuit. There's a case called *Pratt* from the Eighth Circuit. *Virgil* from the Eleventh Circuit. And, of course, *Axson-Flynn* in the Tenth Circuit. That was in the higher education context, but did recognize that when a student is speaking -- slow down. Sorry. When a student is speaking in the curricular context, there are, in fact, First Amendment issues at play.

And, you know, to the extent that this is an issue that also came up in the Florida litigation, I would push back on the idea that a student's right is purely derivative. It's true that in many cases the teachers' right to speak and the students' right to receive might be one to one, but that is certainly not required by this right. And one only needs to think about a case like *Pico*, which is sort of in this same line of cases but relates to book restrictions, restricting

access to books.

And similarly, there was no argument that the librarian themselves had a First Amendment right to have certain books in the library, but students still -- and consumers of the information still have that right. There doesn't necessarily need to be a First Amendment right on the part of the provider to recognize the First Amendment part -- right on the part of the receiver. So I want to make that -- that clear.

I think, you know, the Tenth Circuit in *Miles v. Denver* adopted *Hazelwood* in the K-12 context in evaluating whether a teacher should get in trouble for making certain statements, but it's clear, I think, Your Honor, that when we look at curricular speech, especially in the K-12 context, that it's the *Hazelwood Pico* line of cases that should cover. And in applying that to HB 1775, even though it's a relatively deferential test, as we have shown here, there is no reasonable relationship to a legitimate pedagogical concern.

THE COURT: All right.

Let me hear from defendants then just on that methodological question about standards.

MR. GASKINS: Sure. I think it's first important to point out that this is a facial challenge, which I think is what the Court's question was. And I will say that in June of this year the U.S. Supreme Court in *United States V. Stevens* -- strike that -- in *United States v. Hanson* issued on June 23rd,

2023, held that litigants mounting a facial challenge to a statute normally must establish that no set of circumstances exists under which the statute would be valid.

I would also point the Court to the general rule of statutory construction that says that statutes are interpreted to avoid constitutional conflict and all reasonable doubt is applied in favor of the statute's validity. I think with those two -- those two citations of law, the facial vagueness claim must fail.

The Court is instructed to -- to avoid any sort of constitutional conflict. To the extent that the Court believes that language needs to be narrowed, which I know we will talk about here in a minute, but I think with those two citations of law, it's virtually impossible for the plaintiffs to prevail on their facial vagueness claim as we sit here today.

THE COURT: What about the *Johnson* case?

MR. GASKINS: The *Johnson* case?

THE COURT: So United States vs. -- or *Johnson vs. United States*, anything you want to tell me about that? 2015 case.

MR. GASKINS: Give me one second, let me check real quick.

THE COURT: Sure.

MR. GASKINS: I do know that -- I do know that there was the *United States vs. Stevens* case, which I think we

had cited in our briefing that talked about -- that had a slightly different standard on a facial vagueness claim, but I think the *United States v. Hanson* case overruled that, at least as to what the standard is for a facial vagueness argument.

THE COURT: So in *Johnson* the Court -- the Supreme Court says, "Although statements in some of our opinions could be read to suggest otherwise, our holdings squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grounds." And so if that's good law, that undercuts your position.

MR. GASKINS: I would say that -- well, I mean, again, talking about how the Court interprets what is vague about whether a reasonable person would not understand it, so I think that that -- that has to play into that as well.

So you would have to show that the statute really is vague and there is no reasonable interpretation that -- that would support the constitutional validity of the statute.

THE COURT: But, in any event, you think the *Hanson* decision controls?

MR. GASKINS: We believe the *Hanson* decision from June 23, 2023, controls, which said that litigants mounting a facial challenge to a statute normally must establish that no set of circumstances exist under which the statute would be valid. Now, I will say, though, that that United States V.

Hanson case did put a different standard for the First Amendment claims. And the First Amendment claims, the -- the viewpoint discrimination and the information right claims, that standard, according to the *United States v. Hanson* case, is that the plaintiffs must at least demonstrate that a substantial number of House Bill 1775's applications are unconstitutional as judged in relation to its plainly legitimate sweep.

So it's not as a -- it's not as -- the non-First Amendment claims appears to be that if there's any circumstances that would exist in which the statute would be valid on the First Amendment, it is -- they have to show that there is a substantial number of applications that are unconstitutional.

THE COURT: Tell me about the, to the extent you have anything to say, on the viewpoint discrimination and informational rights claims that is different as far as the standard. Tell me about that.

MR. GASKINS: Sure. Well, yeah, I just -- the standard is, yeah, must show that there's a substantial number of applications that are unconstitutional. I would point out that -- that the cases that the counsel cited regarding the students, those are talking about the students' ability to speak. House Bill 1775 is not -- is aimed toward the classroom curriculum. It's not discussing the students' ability to speak on any sort of topic. So I think that -- those are clearly

distinguishable.

Additionally, I heard plaintiffs appear to admit that the legislature doesn't have any authority to dictate to the University of Oklahoma what it teaches in its classrooms. The university also has alleged that. So I think that would make it, at least with respect to the -- to the standard that the Court should -- should avoid an interpretation that results in a constitutional conflict, at least as it relates to this argument that -- that House Bill 1775 prevents things in -- in a classroom at the University of Oklahoma, that's not what -- that's not permitted and that's not what House Bill 1775 does.

THE COURT: All right. Thank you. Let me have you return to the counsel table.

I'll give plaintiffs a chance to respond if there's anything that you have that you want to say.

MR. SYKES: Now or after?

THE COURT: Right now.

MR. SYKES: Thank you, Your Honor. Just two quick points of clarification. One is my friend said that all of the student speech cases -- or the student cases we cited were about student speech, not about curriculum. That's incorrect, Your Honor. *Arce v. Douglas* was about a Chicano studies curriculum and *Virgil* was about a book that was assigned as a part of the curriculum. *Axson-Flynn* was about a student speaking, but it was about a student -- whether or not they

wanted to participate in a particular play at the university and they were required to do so by the professor.

And so while it's true, it's somewhat about the students' rights and the students' right to speak. The way that the Tenth Circuit analyzed it was about what can be required as part of the curriculum, and so analyzed it under the *Hazelwood* framework in the curricular context. So I think that's solidly where we are in this case.

And *U.S. v. Hanson*, I think at the very end you got the key piece, which is what is normally applied versus what is applied in a situation where there are First Amendment interests at play. This case was argued by my colleague in the Supreme Court, and what the Court ended up doing there was adopting and narrowing interpretation.

So I don't think it necessarily sets an impossible bar for vagueness, but it was discussed by the Supreme Court in the course of narrowing a statute to which -- to a legitimate sweep, which is a part of the overbreadth inquiry.

THE COURT: Okay. Let's go to the second question, and I'll start again with plaintiffs' counsel -- well, let me start with defense counsel. This is a good one to have the defendants' counsel present your first arguments.

And so the question is about Section 1(A) of the Act, which prohibits any orientation or requirement that presents race or sex stereotyping or bias. And so I want to know what

"requirement" means in this context and what does "presents" mean, for that matter?

MR. GASKINS: Sure. So to answer these questions, I think we need to go back to what I just discussed as the fact that statutes are interpreted to avoid constitutional conflict and all reasonable doubt is applied in favor of a statute's validity. And the basic text in the context of House Bill 1775 leads the state defendants to believe that the terms "requirement" and "presents" only apply to orientations, trainings, or counseling activities. Sentences are not read in isolation, but in conjunction with surrounding sentences, and nothing in this subsection or the preceding sentence indicates that the legislature was referring to in-class teaching in subsection 1(A). Rather, the context clearly points to a more narrow and reasonable conclusion that "requirement" and "presents" only apply to activities that are the equivalent to orientations, trainings, or counseling activities.

House Bill 1775 does not apply to university classroom activities. And I believe there was also an agreement between the University of Oklahoma and the plaintiffs that the legislature doesn't even have that authority to -- to pass such a law to dictate what -- what professors teach in their classroom and in normal classroom activities.

So I believe that -- that the only reasonable interpretation of -- of 1(A) is that it only is talking about

these non-classroom activities.

Further, "presents" should be contextually and rationally interpreted to mean "endorses" or "promotes." To interpret "presents" as simply stating or even refuting the racist or sexist concept is patently absurd given the legislature's obvious goal to combat racism and sexism in this bill. The law simply means that orientations or trainings can not present race or sex stereotyping or bias as acceptable or as a positive good.

So those would be -- that is how we have interpreted those provisions based upon the context and the clear intent of the legislature under House Bill 1775.

THE COURT: You're asking me to do a lot of work there, aren't you? I mean, I'm -- "presents," why did the legislature use the word "presents" rather than "endorse" or "promote" if they meant "endorse" or "promote"?

MR. GASKINS: You know, I cannot get into the heads of the 101 members of the house of representatives, or the 44 members of Oklahoma senate. I can only look at what -- what the language is in the surrounding sentences, and the understanding about what the legislature can and can't do, i.e., cannot get into classroom activities at a university. And based upon those -- the language, the context, and those basic principles of constitutional law, that is how we -- we interpret those provisions.

THE COURT: All right. Has there been any enforcement as to Section 1(A)? Is there even an -- an enforcement provision?

MR. GASKINS: Right. That -- that is a -- something that the -- that I believe the University of Oklahoma will speak to, but it's my understanding that there hasn't even been regulations that have been implemented with respect to the section to enforce it. So I do not believe that there has been any sort of enforcement action, but I will defer to my university colleague on that. But I know the attorney general's office has not been involved in any sort of enforcement of that.

THE COURT: Anything that the university counsel is aware of?

MR. WEITMAN: Your Honor, the -- I'm sorry. Let me get to the microphone.

Around the time that House Bill 1775 was enacted, a mandatory orientation, Gateway to Belonging, became a voluntary class. Also, two other classes were added. Students can now either take Gateway to Belonging or Global Perspectives in Engagement or Ethical Leadership Development. This is required of all on-campus 1L students. It is an orientation-type of course.

And this was done out of respect to the legislature. We don't even think the legislature had the authority to require

OU to make that change because that is an on-campus educational issue.

There has been no other types of enforcement of this --

THE COURT: Nothing beyond that -- I mean, that situation that you described I think everybody agrees is a -- there was a voluntary decision, maybe not the university's first choice, but it's certainly the choice that they ultimately made was to change the nature of that orientation --

MR. WEITMAN: I think that's right. And there has been no other enforcement. I know that a -- an affidavit was submitted from a John Doe who said that somebody told him that somebody told that person that they couldn't test. We have refuted that with our own affidavit from the dean of the arts and sciences. There has been no enforcement of House Bill 1775 on campus.

THE COURT: Thank you.

Let me turn then to plaintiffs on this question about Section 1(A) of the Act as it applies to universities.

MR. SYKES: Thank you, Your Honor.

As we have covered a few times, you know, if the admission that plaintiffs have made is that we think that what the legislature did is unconstitutional, yes, we do think that what they did was unconstitutional.

As we said, the clearest reading of the law is that orientation or requirement are two different things.

Plaintiffs, as you noted, are -- sorry -- defendants are asking you to rewrite the law substantially, to rearrange the words, ignore words, and have implications that are not there.

And as I said, this is our reading. This is the reading of our plaintiffs. And getting into the question of what OU did, counsel said it was an orientation, it was a class, it was an orientation-type of class, and that OU did make a change to this class. And we have reason to believe that that was directly related to HB 1775. So I will note that OU does have discretion to decide what trainings are mandatory or not, and to direct the content of its own curriculum.

As I mentioned, usually these cases, these sort of First Amendment higher education cases are between a teacher or a professor or a student and the university, and the court is in the position of trying to decide what is the limits of the university's authority to do X, Y, or Z vis-a-vis members of its community.

We're in a different situation here. We acknowledge that OU has significant discretion in terms of what it does in its own university, but what we have seen here is that the legislature has passed a law, an unconstitutional law, that has forced OU to make a decision.

Now, OU might decide to keep things as they are. But what's important to us is that in one way, shape, or form our clients understand that whether the law is enjoined, whether

this part is excised, as you say, or however we deal with it, it needs to be made perfectly clear, not just in defendants' briefs, because those are nonbinding interpretations, but we need a clear statement, a binding interpretation that says that this HB 1775 cannot reach into the university classroom. And specifically --

THE COURT: So -- go ahead. No, I cut you off. Go ahead.

MR. SYKES: And specifically that the Gateway to Belonging course, which is described as a course, is not implicated by the law. Again, OU can choose what -- to do what they will, but it's important to us and it's important to our clients that it's clear that coursework is not implicated by the law.

THE COURT: All right. Well, let me ask, and this makes our way into question three, suppose the words "or requirement" in Section 1(A) are excised by the Court, what do you have left at that point as far as your argument?

MR. SYKES: Your Honor, OU is still a defendant under our vagueness claim as an enforcer of the Act, but I think the meat of Your Honor's question is --

THE COURT: I don't understand that point. It's as an enforcer of the Act?

MR. SYKES: Yes. So under *Ex Parte Young*, government entities that are responsible for enforcing the Act

can be named as proper defendants in an effort to try to block the law. So in terms of -- they are named as a part of the vagueness claim, but to the meat of Your Honor's question, substantively the heart of our First Amendment academic freedom claim, as separate from our right to receive or vagueness or equal protection claims, but our First Amendment viewpoint overbreadth academic freedom claim does rest on the fact that requirement covers the classroom.

So if requirement either doesn't cover the classroom or is no longer there, that would essentially resolve the meat of our problems with that particular section. And though, as I mentioned, OU would still be a valid defendant on the vagueness claim, I think Your Honor's right that that would alleviate the vast majority of our concerns for that particular claim.

THE COURT: Thank you.

Let me turn to defense counsel and allow you to respond.

MR. WEITMAN: We're going to arm wrestle to see who responds.

THE COURT: If you guys need to talk for a minute, that's fine.

MR. GASKINS: Right. If "or requirement" were excised, there's no argument that 1(A) applies to a classroom setting, and plaintiffs have not shown a concrete and particularized injury from a lack of a mandatory training or orientation, which I believe resolves that issue.

Under the text of House Bill 1775, as now codified in 70 O.S. Section 24-157(A)(2), it's the Oklahoma State Regents for Higher Education that's responsible for promulgating rules subject to the approval of the legislature to implement the provisions. I'm not aware of any such rules that have been implemented as we sit here today, but I'll allow my university colleague to address that further.

THE COURT: Is there anything that you would add?

MR. WEITMAN: Just very quickly, Your Honor.

Your Honor, I just wanted to address the *Ex Parte Young*, what I'll call the elephant in the room now. With the concession that this House Bill 1775 can't reach into our classroom, OU is not an enforcer of this law. So we're not a proper party to the lawsuit.

Now, the state regents have to implement rules regarding 1775, perhaps they remain a proper party, but the regents for the University of Oklahoma do not.

And to answer counsel's statement just a second ago, the state regents have not implemented rules in regard to 1775.

THE COURT: Thank you.

Okay. Let's turn to question four. Let me start with plaintiffs' counsel here. So the question is now turning to Section 1(b) of the Act and asking what does "require" or "make part of a course mean" insofar as the -- the prohibition of the eight forbidden concepts, I've called it, for K to 12

education?

MR. SYKES: Your Honor, we're not sure, you will be surprised to know, what it means to make part of a course. It seems to include any sort of discussion, even to criticize these laws plaintiffs say that that -- or sorry -- defendants say that that is an absurd reading of the law, but that is what the plain text says. It says "make part of a course."

And again, we look at how it's been enforced, or at least how it -- EPS has talked about it in terms of their guidance and adjusting anchor text. That seems clearly to be part of a course.

But also, as I mentioned, the enforcement actions in Tulsa was around a teacher training. So it's not clear to us how that could be part of a course. And likewise, the Boismier enforcement action around the QR codes, it's not at all clear to us how that could be make part of a course. But does it mean any sort of discussion, does it mean any assigned readings, does it mean having a poster on the wall with a message that might implicate some of these ideas? To be honest, Your Honor, we really just can't make sense of it.

THE COURT: I'm going to have a lot more questions for defense counsel on this one. I think plaintiffs' position is very simple, they just say it doesn't make sense at all. But tell me what you think this really means.

MR. GASKINS: Sure. Well, I think we first, just

to go to the law, the plaintiffs' -- or ambiguity of statutory language is determined by reference to the language itself, the specific context in which the language is used, and the broader context of a statute as a whole.

And then in *Hill v. Colorado*, the U.S. Supreme Court in 2000 said that hypertechnical theories as to what the statute might cover and hypothetical cases which conjure up uncertainty in the meaning of words cannot form the basis of a facial attack on a statute.

I would also point out that, as we have previously discussed, a law is vague if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits.

In this instance, the state defendants believe the phrase "require or make a part of a course" simply forbids teaching the specified concepts as being true. Taken as a whole, House Bill 1775 is clearly aimed at protecting children from race and sex discrimination in school curriculum.

In our briefing, the state defendants previously used the George Orwell as an example of teaching two plus two equals five. So let's assume HB 1775 precluded teaching two plus two equals five. People of ordinary intelligence would certainly understand the statement to mean that teachers are permitted to teach students that two plus two equals four. And if a student were asked what is two plus two, what's the answer to that, and

they said five, people of ordinary intelligence would certainly understand that a teacher is permitted to tell the student that the answer they gave is incorrect.

So precluding teachers from teaching two plus two equals five simply means that teachers are precluded from teaching the students how to do math incorrectly. Similarly here, teachers are simply precluded from teaching students that certain discriminatory concepts are true or correct. And people of ordinary intelligence certainly do not believe it prohibits teachers from pointing out that the discriminatory concepts are untrue or incorrect.

I would also point out that the Oklahoma Academic Standards contain numerous references, as we have previously discussed, encourage a discussion of issues related to race and sex discrimination. Therefore, it would be absurd to say that teachers are precluded from even mentioning discrimination or teaching students that it is wrong.

So based upon -- on the context of the statute and -- and the obvious intent of the legislature here, we believe the phrase "require or make part of a course" simply forbids teaching the specified concepts as being true or giving them a -- a positive inclusion.

THE COURT: So let's say -- I want to go through some examples and see if what you understand is what I understand.

So let's think about a high school social studies class. Could an instructor, in teaching about the history of Jim Crow laws in Oklahoma, criticize -- that is the important part there -- directly criticize racially discriminatory views of early Oklahoma officials? And there certainly were lots of those.

MR. GASKINS: Well, I mean, I will point out that the Oklahoma Academic Standards permit examining multiple points of view regarding the evolution of race relations in Oklahoma. Jim Crow laws --

THE COURT: But what about the Act?

MR. GASKINS: What about the Act?

THE COURT: Yes.

MR. GASKINS: Well, the Act incorporates the Oklahoma Academic Standards into it, and it says that to the extent that there is a -- that there is a disagreement, that the Oklahoma Academic Standards control.

So on this hypothetical question, I think that under the language of the specific standard, that would be permitted, that that is one of the multiple points of view regarding the evolution of race relations in Oklahoma.

THE COURT: Separating the two, if I don't fully buy that the Act incorporates those high school standards and I look at just the Act itself, could a teacher who criticized racially discriminatory views in discussing the history of

Oklahoma have their license suspended?

MR. GASKINS: Well, then you're getting into the scienter requirement, that it's in the regulations, which are --

THE COURT: I don't want to get into that yet. I want to talk about what it means to require or make part of a course.

MR. GASKINS: Right.

THE COURT: And so that's what I'm trying to get at.

MR. GASKINS: So from looking at the context of the statute, it appears to -- to the state defendants that the purpose of this statute is to -- is to teach -- is to preclude teaching students that discrimination is a good thing. So that -- that's how we interpret the exact language. And that is -- also appears to be supported by the Oklahoma Academic Standards, which control to the extent that there is a -- that there is a disagreement.

THE COURT: And I suppose you would say the same then as to lesser levels of endorsement, I'll call it. So an instructor assigns reading material like Huckleberry Finn that -- in the course of that novel the author describes wrong and unjust perceptions about black men and women. Assigning that reading material is fine, you would say?

MR. GASKINS: As long as it's not an endorsement

that the students should be -- should discriminate against others, I think that would be perfectly acceptable.

THE COURT: Do you think it constitutes requiring or making something part of a course?

MR. GASKINS: Again, we take the context of this statute to mean that those terms are -- are reflecting that this is a correct world view, a correct world view that you should be -- you should discriminate against others. And as long as the teacher is not doing that, we believe that it falls within the parameters of House Bill 1775.

THE COURT: What about something that would directly get into the eight forbidden concepts? So say in our eleventh grade social security -- pardon me -- eleventh grade social studies class the teacher has a class discussion about, oh, the protestant work ethic and a student voices the opinion that this idea of work ethic and meritocracy has some inherently racist attributes and it's a racist value. Is that something that falls in the category of requiring or making part of a course?

MR. GASKINS: Well, I mean, I think in that example that's the student that is speaking, it's not necessarily the teacher. I guess -- I guess the question is how should the teacher respond if -- if a student makes such a statement?

THE COURT: And your answer is?

MR. GASKINS: Well, I think it's what I -- like I

said with the two plus two equals five example, I think that there is nothing precluding a teacher under House Bill 1775 to teach the students that they should not be discriminatory and should not be -- should be racist or -- or engage in any sort of sex discrimination. I think that is what the intent of the legislature was in this statute. And I think that as long as that's what teacher's response is, I think that would be in line with House Bill 1775.

THE COURT: If the teacher -- or let's start like this, do you think the teacher would be obligated to say no, that's not true?

MR. GASKINS: I think that -- I think, as we talked about, the teacher's speech in a classroom setting, K through 12, that's not protected speech. So I think that they would be required to -- to avoid telling students that they should be racist.

THE COURT: All right. But you have a student who makes a statement. Is the teacher obligated to correct the statement?

MR. GASKINS: I don't think that there is any sort of -- I don't think there's any sort of requirement in here that requires a teacher to affirmatively respond to any question that they are presented by a student. I think that -- but if they did respond, then I believe that they would have to respond consistent with House Bill 1775 and the Oklahoma

Academic Standards.

THE COURT: So if they were to say "that's a good point, does anybody want to respond," is that enough?

MR. GASKINS: Well, I -- again, we have got multiple other issues here. You know, we talked about the scienter requirement and all of those. Just simply saying that's a good point, I don't know if that's necessarily -- that's not necessarily endorsing that that value that the student has indicated is correct.

If the good point is just to engage the students in constructive discussion, I don't see that that would fall under House Bill 1775. But regardless, under the regulations the teacher would not suffer any sort of consequences for making such a statement.

THE COURT: All right. Let's see.

Could a high school teacher affirmatively state that racially discriminatory views of previous Oklahoma officials have resulted in increased poverty and reduced political power for persons of color now?

MR. GASKINS: Well, I mean, I will say that 9.3 of the -- of the Academic Standards do prevent teachers to talk about ongoing issues of race relations, religious discrimination, bigotry, perceived biases. So, I mean, I think that those sort of -- that sort of line of -- line of questioning would be permitted under the Academic Standards.

I guess your question would be let's -- let's take away the Oklahoma Academic Standards, does that fall under House Bill 1775, and I think my answer then would be it goes to it really is an issue of intent. Is the teacher seeking to -- is the teacher intending to tell the students to be racist or be discriminatory? If that's the case, then I think there could be potential consequences to the extent that that was not covered by the Oklahoma Academic Standards.

THE COURT: Can a teacher implicitly make something part of a course? So in the Oklahoma Department of Education's enforcement action, just to give you some broader context and try to assist you in understanding the point, in that Oklahoma Department of Education's enforcement action against Tulsa Public Schools in response to a staff training it is stated by the department, "To be clear, while there may not be express statements that an individual is inherently racist because of their race, consciously or unconsciously, there is evidence making it more likely than not that the training incorporated and/or is based on such concepts."

And so that seems to me to go beyond, or possibly go beyond what was explicitly stated. You're looking at something implicitly arising from a statement.

MR. GASKINS: Sure. And I think someone from the city of Tulsa or the Tulsa Public Schools, if they wanted to bring a claim, they would potentially have an as-applied

challenge that they could make in that situation. My reading of the law -- the state defendants' reading of the law, the Oklahoma attorney general's reading is that it precludes a willful violation. And to me saying something is implicit is not -- is not breaching the standard of showing that it's a willful violation. But again, we don't have anyone from the Tulsa Public Schools that are here challenging the law or challenging the application to them. But I think that would be something that -- that if an as-applied challenge were made in that situation, they could potentially win, but that's still a hypothetical.

THE COURT: I think that's good enough for now. Let me have you sit down. I'm going to turn to plaintiffs, and then we're going to talk about the safe harbor provision in those Oklahoma Academic Standards.

MR. GASKINS: Thank you.

THE COURT: All right. I did want to give you the chance to respond and address any of those points made by the defendants.

MR. SYKES: Sure, Your Honor. I think your series of hypotheticals and hard questions and the difficulty that my friend had with coming up with how a teacher should respond specifically illustrates the chilling effect that we have been discussing. Teachers don't know what will happen in a discussion in a classroom if they are anywhere near any of

these topics, and they may very well at any given moment be put in an impossible position where what they say in response to a particular discussion could put their livelihoods at risk. And so they're going to avoid these topics altogether, and that's what we're seeing.

And I think if you look at the EPS, whether it's guidance, whether it was adopted, whether it was just a slide, I think it illustrates the point exactly. There's a specific sentence that says if a student asks, along that -- the lines of your hypothetical in terms of how do you respond, if a student asks what is CRT, the proposed response, trying to thread that needle that my friend was trying to thread in responding to your hypotheticals, is you're supposed to respond that it's usually a theory that's used to describe laws. Which provides no clarity at all and it shows that what teachers are, in fact, encouraged to do is to -- is to step backwards, raise their hands, and stay as far away from these things as possible.

And that is exactly why vague laws are so dangerous, because the chilling effect can go far beyond what is actually within the text of the law. The text of the law is bad enough on its own. The regulations broaden the sweep of the law, and the implementation of the state, which I understand my friend to now disclaim, is even broader than that, and that is the inevitable result of this vague law.

Shall I move now to the Oklahoma Academic Standards? That

was my only response to the previous --

THE COURT: All right. I want to hear from the defendants first on that point. I want to hear their argument, and then I'll let you respond to that.

MR. SYKES: Okay.

THE COURT: So turning to the next question then, the Act specifically provides that it shall not prohibit the teaching of concepts that align to the Oklahoma Academic Standards, and so tell me what that really means.

MR. GASKINS: Well, I think it's our -- our position that that means that to the extent that there's a conflict between the Oklahoma Academic Standards and House Bill 1775, the Oklahoma Academic Standards control. And as we have pointed out in our briefing and I've pointed out today, the Oklahoma Academic Standards for social studies that include history encourage teaching students about the negative consequences of racism and discrimination, very specific references about teaching students about the Tulsa Race Massacre, Jim Crow laws, the rise of the Ku Klux Klan.

So we think the standards clearly give teachers the freedom to discuss the negative consequences of racism and discrimination.

THE COURT: All right. Let's look at -- okay. So forbidden concept B says that a teacher may not present that an individual by virtue of his or her race or sex is inherently

racist, whether consciously or unconsciously. Can a high school teacher teach about implicit bias?

MR. GASKINS: Well, I mean, I will say that the standards include the teaching -- or include examining multiple points of view regarding the evolution of race relations in Oklahoma. I mean, I think that that would be broad enough to allow such a discussion.

THE COURT: So under the Academic Standards, we have psychology standard 7.2, and I assume that you don't have those memorized.

MR. GASKINS: I don't have -- I have a few of them highlighted in my notes here, but --

THE COURT: Well, this one provides -- and I can read it again if you need me to. I always hated being read something and then you have to remember it exactly on the spot. So I'm going to try do that in as gentle way as possible. But that standard says, "Explain how bias, discrimination, and use of stereotypes influence behavior with regard to gender, race, sexual orientation and ethnicity as demonstrated in the studies of the brown-eyed/blue-eyed experiment and the Clark Doll experiment."

And so the question gets to, at some level, teaching about unconscious bias. Is that -- or the standard gets to the teaching of unconscious bias. Is that -- number one, does that violate the Act?

MR. GASKINS: Well, I mean, the Act says the provisions of this section shall not prohibit the teaching of concepts that align with the Oklahoma Academic Standards. So if it's in the Oklahoma Academic Standards, and I -- I agree with your interpretation of 7.2, then that doesn't violate the Act.

THE COURT: So you say anything in the Oklahoma standards is an absolute and true safe harbor --

MR. GASKINS: That's the only way I can read the statute, shall not prohibit the teaching of concepts that align to the Oklahoma Academic Standards. I read that as, to the extent that there's any conflict, the Oklahoma Academic Standards control.

THE COURT: Okay. Let me turn back to plaintiffs' counsel.

I would hear your response on that general point and that question.

MR. SYKES: Sure, Your Honor.

The Oklahoma Academic Standards do not cure our concerns. In fact, they compound the confusion. And just as an initial point of clarification, Your Honor in the -- ahead of time when you circulated the questions, talked about QR overbreadth or vagueness concerns. Just to clarify, the overbreadth concerns are in higher education, so they would not be in any way affected by the Oklahoma Academic Standards.

But focusing in on the vagueness, I think what my friend on the other side has said is that they are inconsistent. Right? And where they are inconsistent, he argues -- which it doesn't say in the text -- but he argues that the standards must control. This looks at -- this looks like an exception that swallows the statute whole. There's nothing left of the statute if the standards trump the forbidden concepts in every instance.

So we and our clients and everybody else is left to wonder how are they meant to be reconciled? If everything in the standards is left untouched and the standards -- and essentially every piece of the law are inconsistent, then what is left of the law? We would say legitimately nothing, and, therefore, it should all be enjoined.

I talked about the --

THE COURT: Well, wait a minute. Let's -- I mean, if nothing's left of the law and, therefore, it all should be enjoined, the "therefore" seems the important part. If nothing's left of the law, or certainly very little is left of the law, then at that point you just don't have a claim; isn't that right?

MR. SYKES: Well, Your Honor, if the relationship that my friend describes is true, but that is not how we read the statute and that is not how the statute has been enforced.

You -- you highlighted Section B on unconscious bias, and

this is something that is -- an identical provision exists in the Executive Order 13950, in the New Hampshire law, and in the Florida law. And there was extensive discussion exactly to the point that you made, which is how are we meant to address unconscious bias, which is now 30 years old and well-documented with the studies that are mentioned explicitly in the Oklahoma Academic Standards. They are in direct conflict. And so it's not at all clear what it means to comply with HB 1775 while also teaching aligned to the Oklahoma Academic Standards.

So if Your Honor finds a way to make clear to our plaintiffs and other teachers that they should continue to apply the Oklahoma Academic Standards as they were doing before and they can somehow not worry about HB 1775, that would achieve our aims. What -- the situation now is that they are somehow trying to square this circle and figure out how to comply with both.

And as my friend on the other side admitted, it's impossible to do both, and so he just said comply with the Oklahoma Academic Standards. Which again raises the question, then what is HB 1775 doing? And what we are seeing that it does is, as it's being enforced across the state, is it's chilling speech and teaching on race, racism, and sexism. And we worry that it will continue to do so as long as the law is in effect. And the fact that there is this safe harbor is doing nothing to alleviate any of those concerns.

THE COURT: Let me ask again just to -- or if I didn't squarely ask before, let me ask for the first time. If it is a true safe harbor, if I accept the state's position that teaching something that aligns with the Oklahoma Academic Standards is acceptable regardless of whether it's prohibited in the forbidden concepts in House Bill 1775, is there anything left of your claim if that safe harbor is clearly established?

MR. SYKES: Thanks, Your Honor. The inquiry is whether or not teachers will have sufficient notice and whether or not they will be subjected to potentially overbroad -- discriminatory and arbitrary enforcement. And I think no matter how we choose to come out today, the language in section B, Your Honor, on its face is vague. And as long as the language in section B is enforced as vague, it is a constitutional problem for our clients.

And so the -- the Act cannot be allowed to stand as is because no one can make sense of it, and because it is being arbitrarily and discriminatorily enforced. The only point I wanted to make with regard to the Oklahoma Academic Standards is that we have no qualms with the standards as they are. We think they encapsulate a -- the expertise of Oklahoma educators, and our clients would like to continue to teach according to their best practices and according to the Oklahoma Academic Standards.

HB 1775 says that they must change what they're teaching.

They're at a loss for how to comply with both. And the safe harbor does not alleviate their concerns, it compounds them because they don't know how to do both.

THE COURT: All right. Anything else you want to say on that point?

MR. SYKES: No. That's it, Your Honor.

THE COURT: All right. Let's talk about the enforcement provision. Let me start with counsel for the defendants here. So you've pointed out -- or the question assumes that a teacher license may only be revoked for a willful violation of the Act, and so we have a scienter requirement. And so tell me first, how does that affect the vagueness analysis?

MR. GASKINS: Well, I mean, I think I said before a teacher can't be punished for instructing a student on concepts unless they know those concepts are prohibited. If prohibition itself is vague, then by definition I don't believe a teacher can willfully violate it.

So to the extent that there's some sort of -- that would be a defense a teacher would be able to raise, and could be an as-applied challenge to this statute if -- if someone was actually punished and didn't understand the law.

THE COURT: All right. There are other punishments, though, aren't there, that don't require the willful violation?

MR. GASKINS: And I think you're referring to the suspension, and I think -- I disagree that -- I think it's actually the -- the standard to suspend a teacher's license is actually higher than it is to revoke the license. If you go to 75 O.S. Sections 314(C)(2) and 314.1, those discuss suspending a teacher's license. And they require a finding, "That public health, safety, or welfare imperatively requires emergency action in order to suspend the teacher's license." This appears to be a higher standard than what is required to revoke a license. At a minimum --

THE COURT: And what were those provisions again, 314(C)(2)?

MR. GASKINS: And 314.1.

THE COURT: Okay.

MR. GASKINS: Which discuss -- which are the statutes dealing with suspending a teacher's license.

So at a minimum, the public health, safety, or welfare are not likely going to be imperatively impacted by a teacher's violation of House Bill 1775 unless the teacher is willfully violating the Act. I mean, it has -- it has to be a violation that rises to an emergency situation that's impacting the public health, safety, or welfare. So there's that.

And then I'd also point out that under 75 O.S. Section 314(C)(2) and Oklahoma Administrative Code Section 210:1-5-6(e), that requires revocation proceedings to

be promptly instituted following a suspension order. And pursuant to 70 O.S. Sections 6-101(l) and 6-101.29, the teacher is entitled to their full pay and benefits during suspension.

So, therefore, even if a violation constitutes an emergency situation warranting an immediate suspension, the state will still have to show a willful violation in a promptly instituted proceeding before the teacher loses any compensation or benefits.

So I don't think that the -- the lack of a scienter requirement in the J -- in the (j)1 talking about suspension changes that. The statutes still require this higher standard to suspend a teacher, and the teacher is not losing any compensation or benefits after they're suspended. And the revocation proceedings are required to be promptly instituted, which requires the willful violation.

THE COURT: All right. I understand your position. Let me turn to counsel for the plaintiffs.

Anything you want to say on that question or the defendants' argument?

MR. SYKES: Sure, Your Honor.

The scienter requirement, it's -- there are many cases, including *Moreland* in the Northern District of Oklahoma, which say that a scienter requirement may mitigate vagueness. So we think it's a valid inquiry as to whether it might mitigate vagueness, but here it does not. It doesn't

automatically mitigate vagueness. *Keyishian*, one of the sort of landmark cases in this area had a scienter requirement and was found to be vague. And if you look at the example that you raised in terms of the Tulsa enforcement action, they were found to have violated HB 1775 by the state of Oklahoma by implying implicit bias in a -- in a professional development training. Right? So they surely were not willfully violating the statute in terms of making part of a course, but it's so vague -- I can't say "surely" -- it doesn't seem to be that they were willfully violating the statute, yet this is -- the language is so vague that it was still enforced against them.

And so -- as the *Pernell* court found as well, there there was -- even if there is implied intent, there was no scienter requirement in HB 7, the Stop Woke Act in Florida, but the judge said -- in response to defendant's argument that there was a scienter requirement by implication, what he said was even if there were a scienter requirement, that might clarify, you know, who is covered by the law, but it doesn't do anything to alleviate the vagueness within the law itself.

You might -- you have to willfully violate the law, but you still don't know where any of those lines are. So you might willfully undertake the action, but if the rest of it is completely unclear, the scienter requirement doesn't do that much work in the end.

THE COURT: Okay. All right.

MR. GASKINS: Can I respond to that briefly?

THE COURT: Yes.

MR. GASKINS: Thank you.

I just want to reiterate we're here on a facial challenge. Again, if we're going to talk about specific examples of a Tulsa enforcement action and what happened there, whether that was the right decision, that's an as-applied challenge. We're here for a facial challenge, which is a much heavier burden, as we have discussed before.

So I don't want to get -- get caught up in the weeds on these specific examples where those parties certainly could file their own -- their own claim, potentially have standing to assert that their rights were violated there, but we're here on a facial challenge.

THE COURT: Thank you.

Okay. Let's talk about what I can and should do. And so there's several questions that address that, seven, eight and nine in the written questions submitted, and I think that we can talk about those all together.

So let's start with plaintiffs' counsel. And so you have the questions in general. I want to know, can I enjoin some but not all of the Act? And if so, what parts do you think are particularly ripe for harvest?

MR. SYKES: Your Honor, there is a default severability clause in Oklahoma law. So Your Honor does have

the sort of ability to enjoin parts of this law, and not all, if you were to sever them. So as a starting point. That is certainly something -- an option that you have.

In terms of what parts we find most objectionable, as you might not be surprised to learn, the list is long. All of it is bad, maybe in some of it in slightly different ways. But as we have watched through, starting from the very beginning in section A, talking about gender and diversity training -- sexual and gender diversity training, we don't know what that means. "Or requirement" has raised a whole bunch of questions in terms of what it can permissibly implicate and what it has implicated and what we -- what it implicates on its face. Presenting any form of race or sex stereotyping or bias is a problematic formulation. It's vague. And then when we go into Section B in terms of "make part of a course" in terms of each of the concepts themselves, they are hopelessly vague.

So if Your Honor chooses to start cutting sections, that is certainly within your authority to do, but with respect, we think it works as a whole and it is riddled with problems -- constitutional problems throughout.

THE COURT: Can I -- and is there any difference between excising sections of the Act or -- or enjoining enforcement of some provisions of the Act versus adopting a narrowing construction of the Act?

MR. SYKES: There is a difference, Your Honor. And

I understood your questions to raise at least three different possibilities; severability, narrowing construction, and as we'll get to later, certification. And I think, Your Honor, in terms of "or requirement," again orientation or requirement must mean two different things and, therefore, we don't think it's really susceptible to a narrowing interpretation. That must be at least plausible, a narrowing interpretation for a readily -- actually, not just plausible, but readily susceptible to that interpretation for a federal court to do so. And we, as you mentioned, think that it's too much rewriting, it's too much work on your part to rewrite Section 1(A).

If, as you proposed as a part of the questions, "or requirement" were found to be severable and were enjoined and found to be unconstitutional, that is an outcome that we would welcome in as much as it vindicates our higher education plaintiffs' concerns.

When we get to Section 1(b), I think it is even more difficult to see how you can pick and choose what parts of this can survive. The "make part of a course" formulation is hopelessly vague, as your back-and-forth with my friend on the other side showed. And it then implicates the rest of Section B. If we don't know what make part of a course is, how can we know what is allowed and what is not?

And even if we move past that opening phrase and we go one

by one through the concepts themselves, they themselves are problematic. And as you mentioned, Section B talks about unconscious or conscious bias. We talked about how Section D creates a triple negative. We talked about how Section G talks about discomfort, anguish, or any other form of psychological distress.

So we just don't see that the solution for those is to pick and choose which are the worst, but rather to enjoin the law in its entirety.

THE COURT: What about the question whether I should do anything? I am a federal judge. This is a federal court. We're talking about a state statute. Is this a matter that should be certified to the Oklahoma Supreme Court to let it take the first look at it?

MR. SYKES: Your Honor, a court can, as you said. The question is whether you should. And we think here certification is unnecessary. Given the breadth of the language, there is no narrowing construction that we think is readily available. And, therefore, we don't expect the Oklahoma Supreme Court to make any more sense of this language than Your Honor might be allowed to -- or might be able to.

This is not a situation where we have an interaction with other state laws or there are a few plausible interpretations of the law that the -- that the Oklahoma Supreme Court can adopt, one. There's a case that's -- there's a -- *City of*

Houston v. Hill makes clear that while certification may help the judicial process in many cases, it is not an invitation for the state courts to rewrite statutes. And I think, with respect, Your Honor, there is a risk if you send at least large portions of this law to the Oklahoma Supreme Court, what you might be asking them is to save it from itself and rewrite the statute as a whole.

So we think that that type of certification question is inappropriate. So we think it's unnecessary. Other courts have not seen fit to certify questions because the laws are so obviously vague on their face.

And I -- if, though, Your Honor decides that the most prudent course is to certify one or more questions, we would simply ask that you temporarily enjoin the law in the meantime. We think that the certification question indicates that there's a lack of clarity, and this lack of clarity is a constitutional injury to our clients. So if we ask another court to weigh in, we would ask that the law be temporarily enjoined in the meantime.

THE COURT: All right. Thank you.

Let me hear from counsel for the defendants on this question of what I can do and what I should do if I find the Act unconstitutional in any respect.

MR. GASKINS: So I think plaintiffs and the state defendants agree that there is a statute, 75 O.S.

Section 11(a), that's the general severability statute that applies to laws passed after 1989 in the state of Oklahoma, and it -- it pertains a presumption that if a part of a law is found invalid or unconstitutional, the remaining part of the statute is presumed valid unless the Court makes certain findings. So that is the applicable provision if the Court were inclined to enjoin certain portions of the law.

I will say that -- that I think everyone that has argued today agrees that the legislature was not -- doesn't have authority to tell university professors what they can teach in their classroom. So I -- I just don't see how the Court can interpret that statute to mean that it applies to classroom settings.

We think the requirement -- the requirement language is talking about things that are the equivalent of orientations and -- and counseling. We think the Court should -- should attempt to interpret the statute not to violate the Oklahoma constitution. We don't believe that the legislature could tell university professors what they can teach, so I think that one is an easy one.

I think we have talked about the (B)(1) language about require or make part of a course. We believe that's readily susceptible to being limited to teaching the specified concepts as being true.

I would also point out that in the briefing, and maybe I

have missed something, but it didn't appear that there were any arguments on Subsections B, C, E, or H in the briefing that those were ambiguous or vague.

I would also point out that, while in passing, the plaintiffs did challenge Subsections A and F. There really isn't much argument that those are really ambiguous. So I -- I think at a minimum A, B, C, E, F, H -- and H should -- there should be no modifications needed on those.

And I will say that the state defendants have no issue if the Court is confused as to -- as to the interpretation of this statute, to certifying the question to the Oklahoma Supreme Court. We would just -- we just think it would be important to only certify the specific -- or the very specific questions that the Court has so we don't get into a quagmire on that, but we have no issue with the Court certifying that type of question to the Oklahoma Supreme Court.

THE COURT: The oral request by plaintiffs was that if I were to certify some portion of the questions before the Court to the Oklahoma Supreme Court then I should temporarily enjoin enforcement of the Act during that time period.

MR. GASKINS: Right. I don't think that the -- that the plaintiffs have met their burden on an injunction. I mean, one would -- having to show that they were actually injured by these -- by these actual -- the enforcement of this law, which they have not been able to show.

You know, we still have the Oklahoma Academic Standards issue that I think is pretty clear that it doesn't prohibit teaching things that are in those.

You know, to the extent that some -- one of these teachers was actually punished or, you know, they were -- they were facing some sort of imminent threat, I think that potentially an injunction in an as-applied fashion would -- would be appropriate, but I don't think that an across-the-board injunction would be appropriate, especially with the heavy burden on a facial challenge.

THE COURT: Let's go back to the narrowing construction. You referenced it, I think you addressed it in general, but I want to hear from you specifically on, I mean, is there anything there that you think that I cannot do?

MR. GASKINS: I mean, it has to be readily susceptible, right, to the -- the narrowing construction. I think the -- the 1(A) one is very easy. Right? I mean, we all agree that the -- we all agree that the legislature can't tell a university professor what they can and can't teach. So I think that's an easy one.

And everyone, I think, agrees that "or requirement" should not mean something that's in a classroom setting. So I think that -- that one is readily susceptible to a narrowing construction by this Court. And I think that the "require or make part of a course" is also readily susceptible to a

narrowing construction to mean that it's limited to teaching the specified concepts as being true. I think that -- we have talked a lot today. That is -- that appears to be the intent of the legislature, if you read the statute as a whole, is to try and -- and stop racism and sexism in public education. So I think that that is -- that is the readily susceptible and reasonable interpretation of that phrase.

THE COURT: All right. What about the safe harbor? Your view is that that -- a safe harbor of teaching that aligns with the Oklahoma Academic Standards is a true and absolute safe harbor?

MR. GASKINS: Yeah. I mean, the -- I have got the statute here. It says the provisions of this subsection shall not prohibit the teaching of concepts that align to the Oklahoma Academic Standards. I -- "shall not prohibit," I take that to mean what it says. It doesn't prohibit teachers from teaching what is in the Oklahoma Academic Standards.

THE COURT: At least if I accept the plaintiffs' views on a variety of the eight forbidden concepts, or all of the eight forbidden concepts, the way that they would interpret those, there are lots of differences between the Oklahoma Academic Standards and those eight forbidden concepts.

If I, either as a narrowing construction or just a construction, state that the Oklahoma Academic Standards absolutely control and there's no leeway or interpretation that

can be argued otherwise, do you have any objection to that?

MR. GASKINS: Well, I would say that the -- that I have no problem with the Court quoting the language in the statute that says that these are not prohibited. So, I mean, I think it's already in the language. And if the Court wants to reiterate what is already clearly in the statute, we have no objection to that. And that is our position, is that the -- to the extent that there's a conflict, the Oklahoma Academic Standards control.

THE COURT: Let me turn then to plaintiffs' counsel and let you respond to anything in there that you need to respond to or want to.

MR. SYKES: Sure, Your Honor. Just one point on the Tulsa enforcement and this being a facial challenge. Your Honor, we are fully happy, as I mentioned, to stay within the four corners of the law. But to the extent that when we ask questions about narrowing constructions and scienter requirements, we're trying to figure out is there clarity, is there notice for how this law will be enforced. And we think bringing up these examples, the reason why we provided notice to the Court of these examples is not because it's not a -- it's an as-applied challenge to those particular actions, but, rather, it shows that our concerns are not unfounded and are being borne out in the enforcement of the law. So I just wanted to make that clarification.

THE COURT: All right. Thank you.

I want to take a brief recess. As far as the written questions, is there anything else that anyone wants to address? I see counsel for Edmond Public Schools.

MR. FUGITT: Very briefly, Your Honor.

THE COURT: Yes.

MR. FUGITT: Thirty seconds, hopefully.

This goes back to, I think question number four. And I -- it really wasn't a question that was directed at me, but one that I looked into. On the language in 1(B), no employee of a school district shall require, there was some discussion. I was waiting for somebody else to address this point.

The administrative -- the statute provides, in the very last section, two, "The State Board of Education shall promulgate rules subject to approval by the legislature to implement the provisions of this subsection."

The State Board of Education, again, not my client, but they have done that in Oklahoma Administrative Code 210:10-1-23. In subsection (D)(3), that's 210:10-1-23(D)(3), that rule provides "public schools in this state shall be prohibited from adopting programs or utilizing textbooks, instructional materials, curriculum, classroom assignments, orientation, interventions or counseling that include, incorporate, or are based on the discriminatory concepts identified in Subsection C" of that rule, which are the same

prohibitions in the statute.

And my point for mentioning that is, is that, as opposed to there being this sort of bare language in the statute, the State Board of Education has come in behind and given some -- put a little bit of meat on the bones. Again, I'm not here to defend the State Board of Education, but I wanted the Court to be aware that that rule did exist.

THE COURT: Thank you.

Okay. I do -- we have been going for a long time, and amongst other things, particularly when we have counsel arguing throughout, that's tough on the reporter. So I do want to take a brief recess. Let's stop for, I'm going to call it ten minutes, let everybody take a quick break.

And then I'm just going to ask you for general concluding remarks. And if there was anything that you really wanted to say that you didn't get the chance to say or anything that you have said that you think matters in a way that you haven't driven home, then I'll let you do that. And I'm going to think about whether I have any other questions that we didn't get to.

So we are in recess.

(Break taken.)

THE COURT: We're back on the record in Case No. CIV-21-1022, Black Emergency Response Team vs. Drummond.

Let me give both sides the chance to present anything else you want to.

I'll start with plaintiffs' counsel. As I say, you can talk about things that you wanted to talk about that we didn't get to or things that we might have covered but you just want to emphasize the importance of, or whatever else you think I need to know.

MR. SYKES: Thank you, Your Honor.

I just wanted to revisit for a moment the choice that this law puts in front of teachers. Teachers Regan Killackey and Anthony Crawford are here today, and also we have Teacher BB from the NAACP, who in their declaration spoke specifically to this issue of how to navigate this so-called safe harbor around aligning to the Oklahoma Academic Standards. And what teacher BB and our other plaintiffs have said is this -- the standards are not granular. They do not prescribe every single thing that a teacher should teach. And, therefore, the idea that they can easily figure out what aligns to the Oklahoma standards in relation to what is prohibited by HB 1775 is simply an impossible place for them to be. And it ensures that there's a chilling effect, because even if there are the state standards there, they still don't know how HB 1775 will be interpreted or enforced. And this is further magnified by the fact that the regulations create a private right of action.

So teachers face discipline, not just from their schools, not just from their students, but any private citizen can raise these types of complaints. So this type of vague law, which

makes it so hard for teachers to do their job according to their best practices and to the guidance that they have gotten from the state, is simply too much for the First Amendment and for vagueness to bear, and so we ask you to enjoin the law.

THE COURT: Thank you.

I'll turn to counsel for the defendant.

MR. GASKINS: Thank you, Your Honor. Just to address those points, and something we have really haven't talked about today, but there is still the standing issue. Under *Clapper v. Amnesty International U.S.A.*, a party cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm. That is certainly not impending. Further, hypertechnical theories as to what a statute might cover and hypothetical cases which conjure up uncertainty in the meaning of words cannot form the basis of a facial attack on a statute.

This whole statement that the Oklahoma standard -- Academic Standards don't address every single issue, I just don't think that's a fair point. Certainly the -- the Academic Standards are not going to discuss every possible thing that could be taught. But as we're talking -- as we're thinking about racial issues and what we're talking about today, they do specifically allow for the discussion of the evolution of race issues, discussion of bias, discrimination, those type of things are covered in the regulations. So these hypertechnical

theories that the plaintiffs have come up with that -- this hypothetical case that -- which may -- you know, may result in someone being upset with them doesn't form the basis of a facial attack on the statute. So --

THE COURT: But do you recognize some difficulty there? I mean, certainly the Oklahoma Academic Standards, I mean, these are not rules of the road, rules of the highway where you can stop on red and go on green. They're expressed as broad concepts because you can't address every specific thing to teach and, therefore, there's some amount of interpretation that has to go along with it.

MR. GASKINS: Right. And the punishment -- to punish someone for violating the statute requires a willful violation, which I believe provides the protection to the teachers on that issue. And I think some of the examples even given today was Tulsa and Mustang schools, not all of those have been successful prosecutions of various individuals. And if they are, they certainly would have an as-applied challenge that they would be able to come to this court or some other court and vindicate their rights on that, but we have these specific parties that are not facing imminent punishment that have these hypertechnical theories that this thing may harm them one day, which I don't think is sufficient for a facial attack and is not sufficient to -- to have standing to make such a claim here.

THE COURT: All right. Anything else you want me to know?

MR. GASKINS: No, Your Honor.

THE COURT: Okay. All right. Well, thank you both. And let me give the other defendants' counsel a chance to say anything that they want to.

MR. FUGITT: Nothing from Edmond Public Schools.

MR. WEITMAN: Your Honor -- and I'm sorry. I don't mean to belabor points, but I'm a lawyer and I can't help myself. So I'll take just a couple of seconds of your time.

The plaintiffs have conceded that they had no right to a particular orientation course. They have conceded as a matter of law that House Bill 1775 could not reach the classroom of the University of Oklahoma because of our unique constitutional standing.

This Court has pointed out and it's been admitted that there's no enforcement mechanism within the rules. And to the extent any -- or within the statute, and to the extent any enforcement would take place, that would have to be spelled out in rules promulgated by the state regents, not by the University of Oklahoma.

So there's really nothing for this Court to enjoin against the University of Oklahoma and it should not exercise the authority of the federal court and the authority of federal law to enjoin us from enforcing a law that we don't enforce anyway.

Thank you.

THE COURT: Pardon me.

All right. I thank you all for a good argument. I have started to cough, so now is a good time to stop.

Thank you, all. We're adjourned.

(Court adjourned.)

REPORTER'S CERTIFICATION

I, Emily Cripe, Federal Official Realtime Court Reporter, in and for the United States District Court for the Western District of Oklahoma, do hereby certify that pursuant to Section 753, Title 28, United States Code that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 19th day of December, 2023.

/S/ Emily Cripe
EMILY CRIPE, CSR
Federal Official Court Reporter